Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

EMPLOYERS UNDERWRITERS, INC. AND LISA ELLIOTT
Petitioners,

vs.

JIMMY WEAVER, ET UX, JEANETTE WEAVER
Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a claim for benefits under an ERISA plan is preempted only if the claim directly affects the relationship between the employer, the plan and its fiduciaries, and the participants and beneficiaries.

2. Whether a claim for benefits under an ERISA plan is preempted by ERISA when the claimant sues, claiming that he is an employee, but is later found to be an independent contractor.

3. Whether a claim for benefits under an ERISA plan is properly removed when the claimant sues, claiming that he is an employee, but is later found to be an independent contractor.

4. Whether the district court may adjudicate the claim of a person with a colorable, but invalid, claim to be an ERISA participant or beneficiary.

LIST OF PARTIES

PETITIONERS

EMPLOYERS UNDERWRITERS, INC.[1]
LISA ELLIOTT

RESPONDENTS:

JIMMY WEAVER, ET UX,
JEANETTE WEAVER

[1] Employers Underwriters, Inc. has no parents or subsidiaries. It is, however, registered to do business in Texas as "Employers Agency, Inc." and sometimes does business under that name.

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COME Employers Underwriters, Inc. and Lisa Elliott, Petitioners in this cause, and file this Petition for Writ of Certiorari, requesting that the Supreme Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit in favor of Respondents and affirm the judgment of the United States District Court for the Eastern District of Texas.

As grounds for such relief, Petitioners would respectfully show as follows:

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is attached hereto as Appendix A. This opinion is published as *Weaver v. Employers Underwriters, Inc.*, 13 F.3d 172 (5th Cir. 1994). A copy of the Fifth Circuit's judgment is attached hereto as Appendix B. A copy of the Fifth Circuit's order denying Petitioners' petition for rehearing is attached hereto as Appendix C.

The Memorandum Opinion and Order of the District Court for the Eastern District of Texas in No. 9:92cv88, dated January 27, 1993, is unpublished. A copy is attached hereto as Appendix D.

JURISDICTION

The Court of Appeals for the Fifth Circuit reversed the judgment of the District Court on February 9, 1994. Petitioners' motion for rehearing was denied on March 10, 1994.

This petition for writ of certiorari is filed within 90 days after entry of the judgment by the Court of Appeals. This Supreme Court's jurisdiction is founded on 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act (ERISA) provides:

Section 3 [29 U.S.C. § 1002] **Definitions**

For purposes of this title:

> (1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits

in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 [29 U.S.C. § 186(c)] (other than pensions on retirement or death, and insurance to provide such pensions).

***

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

***

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

***

Section 502 [29 U.S.C. § 1132] **Civil enforcement**

(a) Persons empowered to bring a civil action. A civil action may be brought -

(1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 U.S.C. § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or (6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1).

***

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have

concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) **Amount in controversy; citizenship of parties.** The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

***

Section 514 [29 U.S.C. § 1144] **Other laws**

(a) **Supersedure; effective date.** Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]. This section shall take effect on January 1, 1975.

***

(c) **Definitions.** For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

***

28 U.S.C. § 1441 provides:

§1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action within the jurisdiction conferred by section 1331 of this title is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters in which State law predominates.

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) The court to which such civil action is removed is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

STATEMENT OF THE CASE

This is an ERISA case. Respondent Jimmy Weaver was working as a logger for Malcolm Rodrigues, d/b/a Rodrigues Logging, when he claims he was injured on October 6, 1990.

Rodrigues maintained an employee welfare benefit plan with Petitioner Employers Underwriters, Inc. ("Employers"). By its terms, the plan provided accidental death, dismemberment, and disability benefits for Rodrigues' employees.

Employers paid Weaver some $70,000.00 in benefits under the plan in the belief that Weaver was Rodrigues' employee. Petitioner Lisa Elliott, an employee of Employers, offered Weaver $2,700.00 as a full and final settlement of his claim. Weaver accepted this offer on October 23, 1991.

On May 13, 1992, Respondents sued Petitioners and Rodrigues in state court in Tyler County, Texas. The Respondents' state court petition, which remains their only pleading, is reproduced in full as Appendix E hereto.

Respondents alleged that Weaver was employed by Rodrigues and that he was injured in the course and scope of this employment. Thus, Respondents claimed, they was entitled under state law to benefits from Employers under the insurance coverage Rodrigues provided in connection with his plan, and Rodrigues was liable to them in common law negligence for Weaver's personal injuries, since Rodrigues was a nonsubscriber under the Texas Workers' Compensation Act. Respondents also asserted various state law claims against Employers and Elliott for fraud, bad faith, duress, and deceptive trade practices.

Petitioners timely removed the case to the United States District Court for the Eastern District of Texas on the grounds that the Respondents' claims against them were in fact grounded under ERISA even though they are phrased in terms of state law, giving the District Court jurisdiction under 28 U.S.C. § 1331 and removal jurisdiction under 28 U.S.C. § 1441(b). *See Metropolitan Life Ins.*

Co. v. Taylor, 481 U.S. 58 (1987).[1]

In their motion for remand, Respondents argued that their claims were not preempted by ERISA and that the plan was merely an attempt to sidestep the Texas workers' compensation system. They did not claim that Weaver was an independent contractor until they filed a later brief. Even then, Respondents did not amend their pleadings to claim independent contractor status.

On motion for remand, the District Court concluded that Rodrigues insurance plan was an employee welfare benefit plan under ERISA; that Respondents' claims against Petitioners were preempted by ERISA; that Jimmy Weaver was an independent contractor of Rodrigues, rather than an employee; and that, as an independent contractor, Weaver could not maintain a suit under ERISA, being neither a "participant" nor a "beneficiary" as those terms are defined in ERISA.[2]

Accordingly, the District Court dismissed Respondents' claims against Petitioners with prejudice. Since Respondents' negligence claims against Rodrigues did not implicate ERISA, they were not preempted, and the District Court remanded those claims to the state court.

Respondents appealed. On February 9, 1994, the United States Court of Appeals for the Fifth Circuit reversed and ordered the case remanded to the state court. The Court of Appeals denied a petition for rehearing on March 10, 1994.

Petitioners have filed this petition for writ of certiorari in order to prevent a pleading plainly stating a claim under ERISA from being remanded to Texas state court.

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[1] The Court of Appeals held that Respondents' claims are not preempted. Petitioners believe that this holding is erroneous, and in that belief they have filed this petition for writ of certiorari.

[2] In addition, the plan by its terms covered only employees and not independent contractors.

ARGUMENT

I. In determining that ERISA does not preempt Respondents' claims, the Court of Appeals applied a test which is inconsistent with ERISA and the prior opinions of the Supreme Court and which conflicts with the holdings of other courts of appeals.

A. The two-part test applied by the Court of Appeals is explained.

The Nature of the Problem. In this case, Jimmy Weaver filed suit claiming that he was the employee of Malcolm Rodrigues. As a result of this employment, he claimed, he was entitled to benefits under insurance provided by Petitioner Employers Underwriters, Inc. This insurance, the District Court found, was part of an employee welfare benefit plan governed by ERISA. Respondents sued Petitioners for benefits under this plan and for damages which they say they suffered because of the way Respondents handled their claim.

This would seem, therefore, to be a classic ERISA case, in which the Respondents' claims are preempted under Section 514(a) of ERISA, 29 U.S.C. § 1144(a). *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Even though the state court complaint does not refer to ERISA, Congress so completely preempted the subject matter of ERISA that such a case may nonetheless be removed to federal court. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987).

The problem is that, contrary to his pleadings, Weaver was ***not*** Rodrigues' employee. He was, the District Court found, an independent contractor.[3]

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[3] As noted above, the Respondents later claimed that Weaver was an independent contractor in an effort to effectuate remand. *See Barraclough v. ADP Automotive Claims Services, Inc.*, 818 F.Supp. 1310, 1311-12 (N.D.Calif. 1993); *Dworkin v. Hustler Magazine, Inc.*, 611 F.Supp. 781,

The Fifth Circuit's Holding. Because of this fact, the Court of Appeals concluded that Respondents' claims for benefits and damages were not preempted, holding, **"The claims by a nonparticipant and nonbeneficiary to a plan do not affect the relationship between the traditional ERISA entities. Therefore, such claims are not preempted."** (App. at A-7, 13 F.3d at 177)(emphasis added).

To reach this conclusion, the Court of Appeals applied a two-part test announced in *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 245 (5th Cir. 1990). Under this test, state law causes of action are barred only if:

> (1) the state law claims address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claims directly affect the relationship among the traditional ERISA entities--the employer, the plan and its fiduciaries, and the participants and beneficiaries.[4]

Because Weaver was an independent contractor instead of an employee, the Court of Appeals held that he could not be a "participant" or a "beneficiary" as ERISA defines those terms. ERISA Section 3(7) & (8), 29 U.S.C. § 1002(7) & (8). Therefore, the Court of Appeals held that the Respondents' suit did not meet the second prong of the *Memorial Hospital* test and that ERISA did not preempt their claims.

B. This test and the Court of Appeals' holding are inconsistent with ERISA and prior Supreme Court

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784 (D.Wyo. 1985).

[4] In *Memorial Hospital*, the court did note, before phrasing this "test", that "finer discernments might be made. . .". 904 F.2d at 245. The court described the two factors quoted above not as prongs of a test, but as two "unifying characteristics" of cases binding in the Fifth Circuit. *Id.* In the present case, the Court of Appeals refused to make the necessary "finer discernments" and turned an element of analysis into a rigid test.

rulings.

1. Neither ERISA nor this Court employs a two-part test for preemption.

The section of ERISA preempting state laws does not, of course, employ a two-part test. Section 514(a), 29 U.S.C. § 1144(a), says that ERISA "shall supersede any and all Sate laws insofar as they may now or hereafter *relate to* any employee benefit plan . . . ." (Emphasis added).

The scope of Section 514(a) is of "unparalleled breadth." *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 , 1147 (4th Cir. 1985), *aff'd*, 477 U.S. 901. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). "In fact . . . Congress used the words 'relate to' in § 514(a) in their broad sense." *Id.* at 98.

This Court later held that claims virtually identical to Respondents' were preempted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). In *Pilot Life*, the plaintiff sued for "'Tortious Breach of Contract'; 'Breach of Fiduciary Duties'; and 'Fraud in the Inducement.'" *Id.* at 43. He sought "'[d]amages for failure to provide benefits under the insurance policy in a sum to be determined at the time of trial,; '[g]eneral damages for mental and emotional distress and other incidental damages in the sum of $250,000.00,' and '[p]unitive and exemplary damages in the sum of $500,000.00.'" *Id.* at 43-44.

In this case, the claims are for fraud, bad faith, duress, and deceptive trade practices, all arising out of Petitioners' handling of the Respondents' claim for benefits. Under the holdings of *Pilot Life* and *Shaw*, these claims are preempted.

The only basis for distinguishing the Respondents' claims is that, contrary to his pleadings, Weaver was not Rodrigues' employee. Thus under the terms of the plan itself and ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), Respondents had no valid claim to benefits. The Court of Appeals used the two-part test of *Memorial Hospital* to hold Respondents' claims not preempted, but

as this Court wrote in rejecting another two-part test proposed to avoid ERISA preemption, "We cannot engraft a two-step analysis onto a one-step statute." *District of Columbia v. Greater Washington Board of Trade*, 113 S.Ct. 580, 585 (1992). If the state laws on which Respondents base their claims "relate to" Rodrigues' plan, those laws and Respondents claims are preempted. ". . . [T]hat is the end of the matter." *Id.*

2. The Respondents' claims "relate to" the ERISA plan.

In *Shaw*, this Court noted that "[S]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100 n. 21. *See also, Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825, 833 (1988), where the Court noted that ". . . [R]un-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan[5] . . . , although obviously affecting and involving ERISA plans and their trustees, are not pre-empted by ERISA § 514(a)."[6]

In deciding whether a claim's effect on a plan is too tenuous or remote to be preempted, the lower courts have focused on whether the claim arises out of the administration of the plan. *See, e.g., Howard v. Parisian, Inc.*, 807 F.2d 1560, 1564 (11th Cir. 1987); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505 (9th Cir. 1985); *Tybout v. Karr Barth Pension Administration, Inc.*, 819 F.Supp. 371, 384

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[5] Citing a defamation case, *Abofreka v. Alston Tobacco Co.*, 288 S.C. 122, 341 S.E.2d 622 (1986). Obviously, torts such as those alleged in *Pilot Life* are preempted.

[6] Cases finding state law claims too tenuous and remote to be preempted include: *Liberty Corp. v. NCNB Nat'l Bank*, 984 F.2d 1383, 1388-89 (4th Cir. 1993) (limitation of plan's subrogation rights under North Carolina wrongful death statute not preempted); and *Lane v. Goren*, 743 F.2d 1337, 1339-41 (9th Cir. 1984) (state anti-discrimination laws apply to employees of benefit plan).

(D.Del. 1993). Compare *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 755 (10th Cir. 1991).

One can scarcely imagine how a claim could more clearly arise out of the administration of an ERISA plan than a claim, like this one, for benefits and damages resulting from the denial of a claim. *See Shaw, supra,* and *Pilot Life, supra.*

3. ERISA does preempt the claims of nonparticipants and nonbeneficiaries if those claims "relate to" the plan.

Contrary to the Court of Appeals' holding, the claims of nonparticipants and nonbeneficiaries against an ERISA plan *are* preempted if, like the Respondents' claims, they "relate to" the plan. In categorically holding that such parties' claims are not preempted because they "do not affect the relationship between the traditional ERISA entities" (App. at A-7, 13 F.3d at 177), the Court of Appeals simply misstates the law. The courts have denied plaintiffs in many circumstances the standing to sue under ERISA. *See, e.g., Coleman v. Champion Int'l Corp.*, 992 F.2d 530 (5th Cir. 1993); *Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1538 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 81; *Allen v. Western Conf. of Teamsters Pension Trust Fund*, 788 F.2d 648, 649-50 (9th Cir. 1986); *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986)(per curiam), *cert. denied*, 479 U.S. 916; *Yancy v. American Petrofina, Inc.*, 768 F.2d 707 (5th Cir. 1985); and *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir. 1985), *cert. denied*, 474 U.S. 1006.

It is inconceivable that these plaintiffs would be allowed to proceed unhindered in state courts, pursuing damage claims phrased in terms of state law. This

> . . .would allow parties that lacked standing to sue under ERISA to circumvent its enforcement provisions by filing suit in state courts under state law. Arguably, they could thus obtain advantages *denied* to parties plaintiff enumerated under § 1132(a). This is an untenable result.

Hermann Hosp. v. MEBA Medical & Benefits Plan, 845 F.2d 1286, 1290 (5th Cir. 1988)(emphasis in original). *See also, Martin v. General Motors Corp.*, 753 F.Supp. 1347, 1358 (E.D.Mich. 1991), where the court stated:

> Congress simply could not have intended to provide wider protections to persons without a colorable claim for benefits. Instead, by limiting ERISA's remedies to persons who qualify as "participants," Congress intended to deny remedies--under ERISA as well as state law--to persons without a colorable claim for benefits.

The fact that ERISA leaves a plaintiff without a remedy is irrelevant to whether his claim is preempted.[7] *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991), *cert. dism'd*, 113 S.Ct. 2 (1992); *Lister v. Stark*, 890 F.2d 941, 946 (7th Cir. 1989). *See also, Raymond v. Mobil Oil Corp.*, 983 F.2d 1528, 1538 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 81 ("[W]e note the fact that a state law claim may be preempted does not necessarily mandate that there be an ERISA remedy."); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1333 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 812 (1992) ("[T]he lack of an ERISA remedy does not affect a pre-emption analysis."); and *Caterpillar Inc. v. Williams*, 482 U.S. 386, 391 n. 4, (1987)(interpreting Labor Management Relations Act, 29 U.S.C. § 185).

To support its holding, the Court of Appeals cited a number

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[7] One should also note that Respondents are the ones who first injected the independent contractor issue into the case. Petitioners accepted their original claim to be Rodrigues' employee. In an effort to obtain the much more generous damages allowed by Texas law, including damages for mental anquish and punitive damages, Respondents changed their position and began to argue that Weaver was an independent contractor.

of cases holding that ERISA did not preempt the plaintiffs' claims.[8] All but one of these cases consider claims by owner/employers[9] against insurance companies. Employers are expressly excluded from coverage by ERISA under the Department of Labor's regulations.[10] Since owner/employers are expressly excluded from ERISA, they cannot sue under ERISA. If express terms of their contracts with their insurance companies are to be given effect, owner/employers must be afforded their state law rights to enforce those contracts. *See, e.g., Kelly v. Blue Cross & Blue Shield*, 814 F.Supp. 220, 229 (D.R.I. 1993). None of the cited cases allows a plaintiff to modify the express terms of an ERISA plan or gives a non-employee the right to sue for benefits under a plan which by its terms only covers employees.

The one case involving an independent contractor is on its facts quite different from this one. In *Sica v. Equitable Life Assurance Soc'y of the United States*, 756 F. Supp. 539 (S. D. Fla.

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[8] *Fugarino v. Hartford Life & Accident Ins. Co.*, 969 F.2d 178, 186 (6th Cir. 1992), *cert denied*, 113 S.Ct. 1401 (1993); *Madden v. Country Life Ins. Co.*, 835 F.Supp. 1081, 1087, (N. D. Ill. 1993); *Kelly v. Blue Cross & Blue Shield*, 814 F. Supp. 220, 230 (D.R.I. 1993); *Sica v. Equitable Life Assurance Soc'y of the United States*, 756 F. Supp. 539, 540 (S. D. Fla. 1990); *Dodd v. John Hancock Mut. Life Ins. Co.*, 688 F. Supp. 564, 568 (E. D. Cal. 1988)(*dicta*); *Pierce v. Capitol Life Ins. Co.*, 806 P.2d 388, 390 (Colo. App. 1990); *Turnbow v. Pac. Mut. Life Ins. Co.*, 765 P. 2d 1160, 1162 (Nev. 1988), *cert. denied*, 490 U.S. 1102 (1989). In *Turnbow*, the court even found that there was no ERISA plan on which to base preemption. 765 P.2d at 1161.

[9] "Employer" must be taken in the broad sense defined in ERISA Section 3(5), 29 U.S.C. § 1002(5). Thus partners (*Madden*) and sole shareholders (*Kelly*) are considered owners.

[10] "An individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his spouse." 29 C.F.R. § 2510.3-3(c)(1) (1989).

1990), the plaintiff never claimed to be an employee.[11] His status as an independent contractor appears significantly clearer than Weaver's. Most importantly, whether Mr. Sica was an employee or an independent contractor, he was unquestionably covered by the insurance plan at issue. In the present case, Mr. Weaver has no coverage if he is not an employee.[12] Finally, as the Court of Appeals noted in its opinion (at note 12), the *Sica* court simply assumed that an independent contractor can maintain state common law claims. The one case it cites in support of that proposition does not so hold. *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096, 1101 (5th Cir. 1990).

C. The Fifth Circuit's *Memorial Hospital* test conflicts with the holdings of other courts of appeals.

The Court of Appeals for the Fifth Circuit devised its two-part test in *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 245 (5th Cir. 1990). In that opinion, the court used its two-part test to hold that a third-party health care provider may sue a plan administrator for falsely representing that a patient was covered by the health benefits under an ERISA plan, thereby inducing the hospital to admit the patient, who incurred treatment costs totaling $110,829.40 for which she could not pay. 904 F.2d at 238, 245-50.

At least one other court of appeals has held to the contrary. *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272 (6th Cir.

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[11] Compare *Martin v. General Motors, supra*, holding that this Court's reasoning in *Pilot Life*, that ERISA's remedies are exclusive, "is equally applicable to remedies available to persons who *claim* to be 'participants,' . . . but, in fact are not." 753 F.Supp. at 1356-57.

[12] The courts have not looked with favor on attempts to modify the terms of ERISA plans by oral agreements. *See, e.g., Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir. 1986).

1991), *cert. dism'd* 113 S.Ct. 2 (1992). The Tenth Circuit has sided with the Fifth Circuit in its result, but not in its reasoning: that court's analysis focused on whether the health provider's claim effect on the plan was "too tenuous, remote, or peripheral a manner" to be preempted, without trying to impose a two-part test. *Hospice of Metro Denver, Inc. v. Group Health Ins.*, 944 F.2d 752, 754 (10th Cir. 1991), quoting *Shaw v. Delta Air Lines, Inc., supra*, 463 U.S. at 100 n. 21. The Seventh Circuit has recognized the existence of this conflict, without deciding the issue for itself. *Decatur Memorial Hosp. v. Connecticut General Life Ins. Co.*, 990 F.2d 925, 927 (7th Cir. 1993).[13]

The Fifth Circuit itself reached a different result in *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988) (*Hermann I*). There the court cited *Pilot Life, supra*, and *Metropolitan Life, supra*, and stated:

> These cases are controlling, and the hospital's attempt to distinguish them on the grounds that it is not--as were the plaintiffs in those cases--an enumerated party under § 1132(a), is unconvincing and contradictory of its position as an assignee. Adopting Hermann's position would allow parties that lacked standing to sue under ERISA to circumvent its enforcement provisions by filing suit in state courts under state law. Arguably, they could thus obtain advantages *denied* to parties plaintiff enumerated under § 1132(a). This is an untenable result.

845 F.2d at 1290.[14] (Emphasis in original). Unfortunately, this

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[13] Still other courts have given third-party providers a federal common law claim of equitable estoppel. *See, e.g., Psychiatric Institute v. Connecticut Gen'l Life Ins. Co.*, 780 F.Supp. 24,31-32 (D.D.C. 1992).

[14] The Court of Appeals attempts to distinguish *Hermann I* by stating that the plaintiff in that case did have standing. However, the court of appeals did ***not*** hold that the hospital did have standing: it held that the

"untenable result" is precisely what the Court of Appeals has allowed in this case.

II. Even if Respondents' claim was not preempted, the case was nonetheless properly removed and the District Court had jurisdiction.

As explained above, in the Statement of the Case, Respondents sued Petitioners and Malcolm Rodrigues, claiming that Jimmy Weaver was Rodrigues' employee. All of Respondents' allegations in their state court petition, which remains their only pleading, are based on Weaver's employment by Rodrigues.

While the entire pleading, reproduced as Appendix E, demonstrates that this was Respondents' claim, the following excerpts are particularly instructive:

"JIMMY WEAVER was ***employed*** by MALCOLM

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hospital would have standing if it could prove an assignment, something which the court expressly did not find, reserving that decision to the district court on remand. 845 F.2d at 1290. Thus, the language quoted above (and by the Court of Appeals in its opinion in this case, App. at A-6-7, 13 F.3d at 177) is not dictum: if the hospital's state-law claims were not preempted, as a nonparticipant and nonbeneficiary, then its possible standing as an assignee would be irrelevant. The Court of Appeals rejected the hospital's claim of non-preemption. Likewise, if Hermann Hospital could not prove that it was an assignee to the satisfaction of the district court, its claim would not "implicat[e] the relationship between the beneficiary and the ERISA plan" (App. at A-7, 13 F.3d at 178), but its claim would be preempted and barred nonetheless. 845 F.2d at 1290.

After remand to the district court, the Fifth Circuit heard a second appeal of the case in *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 959 F.2d 569 (5th Cir. 1992) ("*Hermann II*"). *Hermann II* was decided after *Memorial Hospital*; when the hospital tried to use *Memorial Hospital* as authority to allow it to assert an independent tort claim, the court of appeals refused, stating, "Hermann's argument is the same argument that we rejected in *Hermann I*." 959 F.2d at 578. The law of the case doctrine barred the hospital from asserting that argument. *Id.*

> RODRIGUES . . . as a chain saw operator." ¶ V, page A-35 (emphasis added).
>
> He was injured "in the course and scope of his ***employment*** for Defendant, MALCOLM RODRIGUES . . ." *Id.* (emphasis added).
>
> When Weaver was injured, Rodrigues "was a nonsubscriber under the Texas Workers' Compensation Act." *Id.*

Respondents sought a variety of damages in their pleading, including "adequate compensation under the terms and provisions of the policy issued to [Rodrigues] by [Employers]." ¶ VII, page A-41.

In an effort to effectuate a remand of the case to state court, the Respondents changed their position, claiming that Weaver was an independent contractor rather than an employee.[15] Despite this shift, the Respondents never amended their pleadings. Even if they had amended their pleadings, however, that would not have deprived the District Court of jurisdiction. Jurisdiction is determined in light of the original complaint, not subsequent amendments. *Brown v. Eastern States Corp.*, 181 F.2d 26 (4th Cir. 1950), *cert. denied*, 340 U.S. 864; 1A J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 0.160[7] (2d Ed. 1993).

Likewise, the Respondents' attacks on the merits of their complaint will not divest the District Court of its jurisdiction. *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1278 (6th Cir. 1991); *Barraclough v. ADP Automotive Claims Services, Inc.*, 818 F.Supp. 1310, 1311-12 (N.D.Calif. 1993); *Dworkin v. Hustler Magazine, Inc.*, 611 F.Supp. 781, 784 (D.Wyo. 1985). "Because plaintiff is asserting a federal claim (whether or not meritorious), defendant has a right to a federal forum. . . .Even if plaintiff's federal claim is meritless, as plaintiff now claims, defendant is entitled to have the [federal] court so determine."

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[15] This claim was not even included in the motion for remand. It first surfaced in a brief filed later.

Barraclough, supra, at 1312.

This rule is consistent with the rule that the allegations of the plaintiff's complaint are taken as true in adjudicating a motion to dismiss for want of jurisdiction under FED. R. CIV. P. 12(b)(1). *See Sladek v. Bell System Management Pension Plan*, 880 F.2d 972, 975 (7th Cir. 1989).

III. Weaver made a "colorable", if ultimately invalid, claim for ERISA benefits, and therefore the federal courts have jurisdiction to determine the merits of his suit.

The Supreme Court has held that "participant," as defined in ERISA, 29 U.S.C. § 1002(7), includes "former employees who . . . have '**a colorable claim**' to vested benefits. [Citation omitted] In order to establish that he or she 'may become eligible' for benefits, a claimant must have **a colorable claim** that . . . he or she will prevail in a suit for benefits . . . ." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989) (emphasis supplied), quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir. 1986) (*per curiam*), *cert. denied*, 479 U.S. 916 (1986), and citing *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).[16]

The Court did not define "colorable claim" in *Firestone*, but other courts have defined the term in other contexts. In *Nemeroof v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980), the court held:

> A claim is colorable, for the purpose of the bad faith exception, when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim. The question is whether a reasonable attorney could have concluded that fact supporting the claim *might be established*,

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[16] Although the issue in *Firestone* was who had a right to obtain plan information from a plan administrator under 29 U.S.C. § 1024(b)(4), the Fifth Circuit has recognized that *Firestone* governs standing in other ERISA cases. *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1220-21 (5th Cir. 1992).

not whether such facts actually *had been established.*" (Emphasis in original)

Likewise, in evaluating a claim for attorney's fees under 42 U.S.C. § 1988 another court has held that "a 'colorable claim' is one that is 'arguably supported by case or ststutory law.'" *Dunn v. The Florida Bar*, 726 F.Supp. 1261, 1270 (M.D.Fla. 1988).

Whatever the definition, a "colorable" claim need not be one that will prevail on the merits. *See Garcia v. Guerra*, 744 F.2d 1159, 1166 (5th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985) (Randall, J., concurring) (claim for attorney's fees under 42 U.S.C. § 1988).

It seems plain that Weaver made a "colorable", if ultimately invalid, claim that he was an employee of Rodrigues and was entitled to benefits under Rodrigues' plan. The district court acknowledged that some of the factors set forth in *Penn v. Howe-Baker Engineers, Inc.*, 898 F.2d 1096 (5th Cir. 1990), suggested that Weaver was an employee rather than an independent contractor. Weaver actually received benefits under the Rodrigues plan as an alleged employee for some time, receiving approximately $70,000.00 in benefits. Every one Weaver's claims against Employers arises out of and directly relates to the handling of Weaver's claims for plan benefits. Each of Weaver's claims is based on the premise that he is entitled to more benefits than those already paid. Thus, when Weaver's alleged causes of action accrued, he was being treated as a participant, even if he properly was not one. He complains of his treatment - as a participant.

Someone like Weaver, who files suit, claiming to be a former employee and seeking benefits allegedly owing him under the terms of an ERISA plan, should be treated as a participant or beneficiary for the purpose of adjudicating his claim, even if he ultimately cannot prove his case. The same law should govern the merits of his claim as the claim of a true beneficiary. To have standing, as opposed to prevailing in the litigation, he should at most have to show a "colorable claim" to benefits under *Firestone*.

Indeed, rather than using "standing"--i.e., status as a "participant" or "beneficiary"--as a jurisdictional tool, the courts would better use such status simply to evaluate whether a plaintiff

made a claim asserting "substantive rights under ERISA's remedial provisions." *Martin v. General Motors Corp.*, 753 F.Supp. 1347, 1358 (E.D.Mich. 1991).[17] This approach has support in decisions of at least two courts of appeals. *See Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1278 (6th Cir. 1991); *Sladek v. Bell System Management Pension Plan*, 880 F.2d 972, 979 (7th Cir. 1989); and *Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221, 226 n. 7 (6th Cir. 1986). Certainly almost any ERISA claimant has "standing" in the traditional Article III sense of the word. *See Construction Industry Retirement Fund v. Kasper Trucking, Inc.*, 10 F.3d 465, 467 (7th Cir. 1993).

Unless one of these approaches is used in ERISA cases, the district courts will invariably face the peculiar "jurisdictional conundrum" of having jurisdiction to find in the plaintiff's favor but not against him. *See Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656 (9th Cir. 1983). *Cf. USAchem, Inc. v. Goldstein*, 512 F.2d 163, 170 (2d Cir. 1975) (holding that in diversity cases the amount in controversy is determined by the plaintiff's original claim and not by reference to the ultimate award).

CONCLUSION

The decision of the Court of Appeals has yielded the most incongruous result. Jimmy Weaver's suit as an employee, claiming benefits under an ERISA plan, is held not preempted by ERISA.

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[17] The cases discussing ERISA "standing" as a jurisdictional issue point to Section 502(a), 29 U.S.C. § 1132(a). But that subsection does not include the word "standing" or "jurisdiction". It purports to define "[p]ersons empowered to bring a civil action." Jurisdiction is addressed in Section 502(e), which gives state courts concurrent jurisdiction with the federal district courts over claims under Section 502(a)(1)(B) for benefits or to enforce rights under a plan.

The very pleading in which he claims he is an employee will be remanded to the Texas state courts, where Weaver will be free to assert state law claims against the plan, including claims for mental anguish and punitive damages.

Petitioners respectfully submit that this result was not intended by Congress when it enacted ERISA and that it is wholly inconsistent with the statute and the case law.

Therefore, Petitioners respectfully request that the Supreme Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, reverse the judgment of the Court of Appeals, affirm the judgment of the United States District Court for the Eastern District of Texas, and grant Petitioners such other and further relief as may be just.

Respectfully submitted,

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